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U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

5/15/09

*Attorneys for Plaintiffs and proposed
collective action members*

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X
**JOHANES WIDJAJA, ERNIE NG, MIN
JOONGKIN KIM, and AMPRI GUNARDI,**

Plaintiffs,

v.

**KANG YUE USA CORPORATION d/b/a
MoCA ASIAN BISTRO, and JOHNSON
CHEN,**

Defendants.
-----X

109 - 2089
COMPLAINT

MAUSKOPF, J.

FLSA COLLECTIVE ACTION

DEMAND FOR JURY TRIAL

POLLAK, M.J.

1. Plaintiffs, by and through their attorneys, allege as follows:

JURISDICTION AND VENUE

2. This Court has original federal question jurisdiction under 28 U.S.C. § 1331 because this case is brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"). This Court has supplemental jurisdiction over the New York state law claims, as they are so related in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

1

3. Venue is proper in this District because Defendants conduct business in this District, and the acts and/or omissions giving rise to the claims herein alleged took place in this District.

THE PARTIES

4. All Defendants are hereinafter collectively referred to as "Defendants."

5. Defendant Kang Yue USA Corporation is a New York corporation. Defendant Kang Yue USA Corporation operates MoCA Asian Bistro located in New York City.

6. Defendant Johnson Chen is the Owner and Chief Executive Officer of the Corporate Defendant and exercises sufficient control of its day to day operations to be considered Plaintiffs' employer under the Fair Labor Standards Act and New York state law. Additionally, upon information and belief, Defendant Chen is liable for the wages of Plaintiff and those similarly situated under New York Business Corporation Law § 630.

7. Plaintiff Johannes Widjaja was employed by Defendants as a server at MoCA Asian Bistro within the last three years.

8. Plaintiff Ernie Ng was employed by Defendants as a server at MoCA Asian Bistro within the last three years.

9. Plaintiff Min Joongkin Kim was employed by Defendants as a server at MoCA Asian Bistro within the last three years.

10. Plaintiff Ampri Gunardi was employed by Defendants as a server at MoCA Asian Bistro within the last three years.

FLSA COLLECTIVE ACTION ALLEGATIONS

11. Plaintiffs bring the First and Second Claims for Relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all non exempt persons employed by Defendants at any New York location in any tipped position on or after the date that is three years before the filing of the Complaint in this case as defined herein ("FLSA Collective Plaintiffs").

12. At all relevant times, Plaintiffs and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subject to Defendants' decision, policy, plan and common policies, programs, practices, procedures, protocols, routines, and rules willfully failing and refusing to pay them at the legally required minimum wage for all hours worked and one and one half times this rate for work in excess of forty (40) hours per workweek, and allowing non-tipped employees to share in their tips. The claims of Plaintiffs stated herein are essentially the same as those of the other FLSA Collective Plaintiffs.

13. The First and Second Claims for Relief are properly brought under and maintained as an opt-in collective action pursuant to § 16(b) of the FLSA, 29 U.S.C. 216(b). The FLSA Collective Plaintiffs are readily ascertainable. For purpose of notice and other purposes related to this action, their names and addresses are readily available from the Defendants. Notice can be provided to the FLSA Collective Plaintiffs via first class mail to the last address known to Defendants.

FACTS

14. Defendants committed the following alleged acts knowingly, intentionally and willfully.

15. Defendants knew that nonpayment of minimum wage, nonpayment of overtime, and improperly forcing the Plaintiffs to share their tips with Defendants' agents would economically injure Plaintiffs and violated federal and state laws.

16. Plaintiffs were not compensated for all hours worked, including overtime.

17. Until December 31, 2004, the minimum wage under New York state law was \$5.15 per hour. From January 1, 2005 until December 31, 2005 the minimum wage under state law was \$6.00 per hour. In 2006 the minimum wage was \$6.75 per hour, and the state minimum wage is currently \$7.15 per hour.

18. The federal minimum wage was \$5.15 per hour until July 2007, when it changed to \$5.85 per hour.

19. Defendants unlawfully paid the Plaintiffs an hourly rate below the federal and state minimum wage.

20. Defendants were not entitled to reduce the minimum wage by applying the tip credit allowance that is available cases under 29 U.S.C 203 (m) and 12 N.Y.C.R.R. § 137-1.5 because Defendants retained Plaintiffs' tips.

21. When customers tip Plaintiffs by credit card, Defendants retain 11.5% of these tips.

22. Plaintiffs often worked in excess of forty hours per workweek.

23. Plaintiffs were not compensated one and one half times New York State and federal minimum wage for hours that they worked in excess of forty per workweek.

24. Defendants committed the foregoing acts against the Plaintiffs and the FLSA Collective Plaintiffs.

FIRST CLAIM FOR RELIEF
(FLSA Claims, 29 U.S.C. §§ 201, *et seq.*,
Brought by Plaintiffs on Behalf of
Themselves and the FLSA Collective Plaintiffs)

25. Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

26. At all relevant times, Defendants have been, and continue to be, “employers” engaged in interstate “commerce” and/or in the production of “goods” for “commerce,” within the meaning of FLSA, 29 U.S.C. § 203. At all relevant times, Defendants have employed, “employee[s],” including Plaintiffs and each of the FLSA Collective Plaintiffs.

27. Throughout the statute of limitations period covered by these claims, Defendants knowingly failed to pay Plaintiffs the federal minimum wage for each hour worked.

28. Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, seek damages in the amount of their respective unpaid compensation, liquidated (double) damages as provided by the FLSA for minimum wage violations, attorneys’ fees and costs, and such other legal and equitable relief as this Court deems just and proper.

SECOND CLAIM FOR RELIEF
(FLSA Overtime Violations, 29 U.S.C. §§ 201 *et seq.*
Brought by Plaintiffs on Behalf of Themselves
and the FLSA Collective Plaintiffs)

29. Plaintiffs, on behalf of themselves and other FLSA Collective Plaintiffs, reallege and incorporate by reference all previous paragraphs.

30. Throughout the statute of limitations period covered by these claims, Plaintiffs and the other FLSA Collective Plaintiffs regularly worked in excess of forty (40) hours per workweek and continue to do so.

31. At all relevant times, Defendants had and operated under a decision, policy and plan, and under common policies, programs, practices, procedures, protocols, routines and rules of willfully failing and refusing to pay the Class members at one and one half times the minimum wage for work in excess of forty (40) hours per workweek, and willfully failing to keep records required by the FLSA even though the FLSA Collective Plaintiffs have been and are entitled to overtime.

32. At all relevant times, Defendants willfully, regularly and repeatedly failed to pay Plaintiffs and the FLSA Collective Plaintiffs at the required overtime rates, one and a half times the federal minimum wage for hours worked in excess of forty (40) hours per workweek.

33. Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, seek damages in the amount of their respective unpaid overtime compensation, liquidated (double) damages as provided by the FLSA for overtime violations, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

THIRD CLAIM FOR RELIEF
(New York State Minimum Wage Act, New York Labor Law §§ 650 *et seq.*)

34. Plaintiffs reallege and incorporate by reference all preceding paragraphs as if they were set forth again herein.

35. Defendants knowingly paid the Plaintiffs less than the New York State Minimum Wage § 652 and supporting regulations of the New York State Department of Labor.

36. Defendants did not pay Plaintiffs minimum wage for all hours worked.

37. Defendants' failure to pay Plaintiffs the minimum wage was willful within the meaning of N.Y. Lab. Law § 663.

38. As a result of Defendants' willful and unlawful conduct, Plaintiffs are entitled to an award of damages in amount to be determined at trial, liquidated damages, and attorneys' fees, as provided by N.Y. Lab. Law § 663.

FOURTH CLAIM FOR RELIEF
(New York Minimum Wage Act, N.Y. Stat. § 650 *et seq.*)

39. Plaintiffs reallege and incorporate by reference all previous paragraphs.

40. It is unlawful under New York law for an employer to suffer or permit a non-exempt employee to work without paying overtime wages for all hours worked in excess of forty (40) hours in any workweek.

41. Defendants willfully, regularly and repeatedly failed to pay Plaintiffs at the required overtime rates, one and a half times the minimum wages for hours worked in excess of forty (40) hours per workweek.

42. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiffs have sustained damages, including loss of earnings, in an amount

to be established at trial, prejudgment interest, and costs, liquidated damages, and attorneys' fees, pursuant to N.Y. Lab. Law § 663.

FIFTH CLAIM FOR RELIEF
**(Illegal Pay Deductions and Deductions from Gratuities,
N.Y. Lab. L. §§ 193 and 196-d)**

43. Plaintiffs reallege and incorporate by reference all previous paragraphs.

44. Defendants retained portions of Plaintiffs' tips and distributed them to non-tipped and/or managerial employees.

45. As a result of Defendants' willful and unlawful conduct, Plaintiffs are entitled to an award of damages in an amount to be determined at trial, liquidated damages, and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the FLSA Collective Plaintiffs, pray for relief as follows:

- A. Designation of this action as a collective action on behalf of the FLSA Collective Plaintiffs (asserting FLSA claims and state claims) and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims and state claims in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b);
- B. Designation of Plaintiff as Representative of the FLSA Collective Plaintiffs;

- C. An award of damages, according to proof, including liquidated damages, to be paid by Defendant;
- D. Penalties available under applicable laws;
- E. Costs of action incurred herein, including expert fees;
- F. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216, N.Y. Lab. L. § 663 and other applicable statutes;
- G. Pre-Judgment and post-judgment interest, as provided by law; and
- H. Such other and further legal and equitable relief as this Court deems necessary, just and proper.

Dated: New York, New York
May 12, 2009

Respectfully submitted,

JOSEPH & HERZFELD LLP

By:



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action members*

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.